



6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R04-OAR-2014-0426; FRL-9944-52-Region 4]

Approval and Promulgation of Implementation Plans; Kentucky;

Infrastructure Requirements for the 2010 Sulfur Dioxide National Ambient Air Quality

Standard

AGENCY: Environmental Protection Agency.

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve portions of the State Implementation Plan (SIP) submission, submitted by the Commonwealth of Kentucky, Energy and Environment Cabinet, Department for Environmental Protection, through the Kentucky Division for Air Quality (KDAQ), on April 26, 2013, to demonstrate that the Commonwealth meets the infrastructure requirements of the Clean Air Act (CAA or Act) for the 2010 1-hour sulfur dioxide (SO₂) national ambient air quality standard (NAAQS). The CAA requires that each state adopt and submit a SIP for the implementation, maintenance and enforcement of each NAAQS promulgated by EPA, which is commonly referred to as an “infrastructure” SIP. KDAQ certified that the Kentucky SIP contains provisions that ensure the 2010 1-hour SO₂ NAAQS is implemented, enforced, and maintained in Kentucky. EPA is proposing to determine that Kentucky’s infrastructure submission, submitted on April 26, 2013, addresses certain infrastructure elements for the 2010 1-hour SO₂ NAAQS.

DATES: Written comments must be received on or before [insert date 30 days after date of publication in the Federal Register].

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-R04-OAR-2014-0426 at <http://www.regulations.gov>. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from Regulations.gov. EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (i.e. on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <http://www2.epa.gov/dockets/commenting-epa-dockets>.

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I. Background and Overview

On June 22, 2010 (75 FR 35520), EPA revised the primary SO₂ NAAQS to an hourly standard at a level of 75 parts per billion (ppb), based on a 3-year average of the annual 99th percentile of 1-hour daily maximum concentrations. Pursuant to section 110(a)(1) of the CAA, states are required to submit SIPs meeting the applicable requirements of section 110(a)(2) within three years after promulgation of a new or revised NAAQS or within such shorter period as EPA may prescribe. Section 110(a)(2) requires states to address basic SIP elements such as requirements for monitoring, basic program requirements and legal authority that are designed to assure attainment and maintenance of the NAAQS. States were required to submit such SIPs for the 2010 1-hour SO₂ NAAQS to EPA no later than June 2, 2013.¹

¹ In these infrastructure SIP submissions states generally certify evidence of compliance with sections 110(a)(1) and (2) of the CAA through a combination of state regulations and statutes, some of which have been incorporated into

Today's action is proposing to approve Kentucky's infrastructure SIP submission for the applicable requirements of the 2010 1-hour SO₂ NAAQS. With respect to the interstate transport provisions pertaining to the contribution to nonattainment or interference with maintenance in other states and the visibility requirements of section 110(a)(2)(D)(i)(I) and (II) (prongs 1, 2, and 4), and the minor source program requirements of section 110(a)(2)(C), EPA is not proposing any action at this time regarding these requirements. For the aspects of Kentucky's submittal proposed for approval today, EPA notes that the Agency is not approving any specific rule, but rather proposing that Kentucky's already approved SIP meets certain CAA requirements.

II. What Elements are Required Under Sections 110(a)(1) and (2)?

Section 110(a) of the CAA requires states to submit SIPs to provide for the implementation, maintenance, and enforcement of a new or revised NAAQS within three years following the promulgation of such NAAQS, or within such shorter period as EPA may prescribe. Section 110(a) imposes the obligation upon states to make a SIP submission to EPA for a new or revised NAAQS, but the contents of that submission may vary depending upon the facts and circumstances. In particular, the data and analytical tools available at the time the state develops and submits the SIP for a new or revised NAAQS affects the content of the submission.

the federally-approved SIP. In addition, certain federally-approved, non-SIP regulations may also be appropriate for demonstrating compliance with sections 110(a)(1) and (2). Throughout this rulemaking, unless otherwise indicated, the term "401 KAR XX:XXX" indicates that the cited regulation has either been approved, or submitted for approval into Kentucky's federally-approved SIP. The State statutes cited from the Kentucky Revised Statutes (also referred to as "KRS") throughout this rulemaking are not approved into the Kentucky SIP, unless otherwise indicated.

The contents of such SIP submissions may also vary depending upon what provisions the state's existing SIP already contains.

More specifically, section 110(a)(1) provides the procedural and timing requirements for SIPs. Section 110(a)(2) lists specific elements that states must meet for “infrastructure” SIP requirements related to a newly established or revised NAAQS. As mentioned above, these requirements include basic SIP elements such as requirements for monitoring, basic program requirements and legal authority that are designed to assure attainment and maintenance of the NAAQS. The requirements that are the subject of this proposed rulemaking are summarized below and in EPA’s September 13, 2013, memorandum entitled “Guidance on Infrastructure State Implementation Plan (SIP) Elements under Clean Air Act Sections 110(a)(1) and 110(a)(2).”²

- 110(a)(2)(A): Emission Limits and Other Control Measures
- 110(a)(2)(B): Ambient Air Quality Monitoring/Data System
- 110(a)(2)(C): Programs for Enforcement of Control Measures and for Construction or Modification of Stationary Sources³
- 110(a)(2)(D)(i)(I) and (II): Interstate Pollution Transport
- 110(a)(2)(D)(ii): Interstate Pollution Abatement and International Air Pollution

²Two elements identified in section 110(a)(2) are not governed by the three year submission deadline of section 110(a)(1) because SIPs incorporating necessary local nonattainment area controls are not due within three years after promulgation of a new or revised NAAQS, but rather due at the time the nonattainment area plan requirements are due pursuant to section 172. These requirements are: (1) submissions required by section 110(a)(2)(C) to the extent that subsection refers to a permit program as required in part D, title I of the CAA; and (2) submissions required by section 110(a)(2)(I) which pertain to the nonattainment planning requirements of part D, title I of the CAA. Today’s proposed rulemaking does not address infrastructure elements related to section 110(a)(2)(I) or the nonattainment planning requirements of 110(a)(2)(C).

³This rulemaking only addresses requirements for this element as they relate to attainment areas.

- 110(a)(2)(E): Adequate Resources and Authority, Conflict of Interest, and Oversight of Local Governments and Regional Agencies
- 110(a)(2)(F): Stationary Source Monitoring and Reporting
- 110(a)(2)(G): Emergency Powers
- 110(a)(2)(H): SIP Revisions
- 110(a)(2)(I): Plan Revisions for Nonattainment Areas⁴
- 110(a)(2)(J): Consultation with Government Officials, Public Notification, and Prevention of Significant Deterioration (PSD) and Visibility Protection
- 110(a)(2)(K): Air Quality Modeling and Submission of Modeling Data
- 110(a)(2)(L): Permitting fees
- 110(a)(2)(M): Consultation and Participation by Affected Local Entities

III. What is EPA’s Approach to the Review of Infrastructure SIP Submissions?

EPA is acting upon the SIP submission from Kentucky that addresses the infrastructure requirements of CAA sections 110(a)(1) and 110(a)(2) for the 2010 1-hour SO₂ NAAQS. The requirement for states to make a SIP submission of this type arises out of CAA section 110(a)(1). Pursuant to section 110(a)(1), states must make SIP submissions “within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national primary ambient air quality standard (or any revision thereof),” and these SIP submissions are to provide for the “implementation, maintenance, and enforcement” of such NAAQS. The statute directly imposes on states the duty to make these SIP submissions, and the requirement to make the submissions is not conditioned upon EPA’s taking any action other than promulgating a new or revised

⁴ As mentioned above, this element is not relevant to today’s proposed rulemaking.

NAAQS. Section 110(a)(2) includes a list of specific elements that “[e]ach such plan” submission must address.

EPA has historically referred to these SIP submissions made for the purpose of satisfying the requirements of CAA sections 110(a)(1) and 110(a)(2) as “infrastructure SIP” submissions. Although the term “infrastructure SIP” does not appear in the CAA, EPA uses the term to distinguish this particular type of SIP submission from submissions that are intended to satisfy other SIP requirements under the CAA, such as “nonattainment SIP” or “attainment plan SIP” submissions to address the nonattainment planning requirements of part D of title I of the CAA, “regional haze SIP” submissions required by EPA rule to address the visibility protection requirements of CAA section 169A, and nonattainment new source review (NNSR) permit program submissions to address the permit requirements of CAA, title I, part D.

Section 110(a)(1) addresses the timing and general requirements for infrastructure SIP submissions, and section 110(a)(2) provides more details concerning the required contents of these submissions. The list of required elements provided in section 110(a)(2) contains a wide variety of disparate provisions, some of which pertain to required legal authority, some of which pertain to required substantive program provisions, and some of which pertain to requirements for both authority and substantive program provisions.⁵ EPA therefore believes that while the timing requirement in section 110(a)(1) is unambiguous, some of the other statutory provisions are ambiguous. In particular, EPA believes that the list of required elements for infrastructure

⁵ For example: Section 110(a)(2)(E)(i) provides that states must provide assurances that they have adequate legal authority under state and local law to carry out the SIP; section 110(a)(2)(C) provides that states must have a SIP-approved program to address certain sources as required by part C of title I of the CAA; and section 110(a)(2)(G) provides that states must have legal authority to address emergencies as well as contingency plans that are triggered in the event of such emergencies.

SIP submissions provided in section 110(a)(2) contains ambiguities concerning what is required for inclusion in an infrastructure SIP submission.

The following examples of ambiguities illustrate the need for EPA to interpret some section 110(a)(1) and section 110(a)(2) requirements with respect to infrastructure SIP submissions for a given new or revised NAAQS. One example of ambiguity is that section 110(a)(2) requires that “each” SIP submission must meet the list of requirements therein, while EPA has long noted that this literal reading of the statute is internally inconsistent and would create a conflict with the nonattainment provisions in part D of title I of the Act, which specifically address nonattainment SIP requirements.⁶ Section 110(a)(2)(I) pertains to nonattainment SIP requirements and part D addresses when attainment plan SIP submissions to address nonattainment area requirements are due. For example, section 172(b) requires EPA to establish a schedule for submission of such plans for certain pollutants when the Administrator promulgates the designation of an area as nonattainment, and section 107(d)(1)(B) allows up to two years, or in some cases three years, for such designations to be promulgated.⁷ This ambiguity illustrates that rather than apply all the stated requirements of section 110(a)(2) in a strict literal sense, EPA must determine which provisions of section 110(a)(2) are applicable for a particular infrastructure SIP submission.

Another example of ambiguity within sections 110(a)(1) and 110(a)(2) with respect to infrastructure SIPs pertains to whether states must meet all of the infrastructure SIP requirements

⁶ See, e.g., “Rule To Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule); Revisions to Acid Rain Program; Revisions to the NO_x SIP Call; Final Rule,” 70 FR 25162, at 25163 – 65 (May 12, 2005) (explaining relationship between timing requirement of section 110(a)(2)(D) versus section 110(a)(2)(I)).

⁷ EPA notes that this ambiguity within section 110(a)(2) is heightened by the fact that various subparts of part D set specific dates for submission of certain types of SIP submissions in designated nonattainment areas for various pollutants. Note, e.g., that section 182(a)(1) provides specific dates for submission of emissions inventories for the ozone NAAQS. Some of these specific dates are necessarily later than three years after promulgation of the new or revised NAAQS.

in a single SIP submission, and whether EPA must act upon such SIP submission in a single action. Although section 110(a)(1) directs states to submit “a plan” to meet these requirements, EPA interprets the CAA to allow states to make multiple SIP submissions separately addressing infrastructure SIP elements for the same NAAQS. If states elect to make such multiple SIP submissions to meet the infrastructure SIP requirements, EPA can elect to act on such submissions either individually or in a larger combined action.⁸ Similarly, EPA interprets the CAA to allow it to take action on the individual parts of one larger, comprehensive infrastructure SIP submission for a given NAAQS without concurrent action on the entire submission. For example, EPA has sometimes elected to act at different times on various elements and sub-elements of the same infrastructure SIP submission.⁹

Ambiguities within sections 110(a)(1) and 110(a)(2) may also arise with respect to infrastructure SIP submission requirements for different NAAQS. Thus, EPA notes that not every element of section 110(a)(2) would be relevant, or as relevant, or relevant in the same way, for each new or revised NAAQS. The states’ attendant infrastructure SIP submissions for each NAAQS therefore could be different. For example, the monitoring requirements that a state might need to meet in its infrastructure SIP submission for purposes of section 110(a)(2)(B)

⁸ See, e.g., “Approval and Promulgation of Implementation Plans; New Mexico; Revisions to the New Source Review (NSR) State Implementation Plan (SIP); Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR) Permitting,” 78 FR 4339 (January 22, 2013) (EPA’s final action approving the structural PSD elements of the New Mexico SIP submitted by the State separately to meet the requirements of EPA’s 2008 PM_{2.5} NSR rule), and “Approval and Promulgation of Air Quality Implementation Plans; New Mexico; Infrastructure and Interstate Transport Requirements for the 2006 PM_{2.5} NAAQS,” (78 FR 4337) (January 22, 2013) (EPA’s final action on the infrastructure SIP for the 2006 PM_{2.5} NAAQS).

⁹ On December 14, 2007, the State of Tennessee, through the Tennessee Department of Environment and Conservation, made a SIP revision to EPA demonstrating that the State meets the requirements of sections 110(a)(1) and (2). EPA proposed action for infrastructure SIP elements (C) and (J) on January 23, 2012 (77 FR 3213) and took final action on March 14, 2012 (77 FR 14976). On April 16, 2012 (77 FR 22533) and July 23, 2012 (77 FR 42997), EPA took separate proposed and final actions on all other section 110(a)(2) infrastructure SIP elements of Tennessee’s December 14, 2007, submittal.

could be very different for different pollutants because the content and scope of a state's infrastructure SIP submission to meet this element might be very different for an entirely new NAAQS than for a minor revision to an existing NAAQS.¹⁰

EPA notes that interpretation of section 110(a)(2) is also necessary when EPA reviews other types of SIP submissions required under the CAA. Therefore, as with infrastructure SIP submissions, EPA also has to identify and interpret the relevant elements of section 110(a)(2) that logically apply to these other types of SIP submissions. For example, section 172(c)(7) requires that attainment plan SIP submissions required by part D have to meet the “applicable requirements” of section 110(a)(2). Thus, for example, attainment plan SIP submissions must meet the requirements of section 110(a)(2)(A) regarding enforceable emission limits and control measures and section 110(a)(2)(E)(i) regarding air agency resources and authority. By contrast, it is clear that attainment plan SIP submissions required by part D would not need to meet the portion of section 110(a)(2)(C) that pertains to the PSD program required in part C of title I of the CAA, because PSD does not apply to a pollutant for which an area is designated nonattainment and thus subject to part D planning requirements. As this example illustrates, each type of SIP submission may implicate some elements of section 110(a)(2) but not others.

Given the potential for ambiguity in some of the statutory language of section 110(a)(1) and section 110(a)(2), EPA believes that it is appropriate to interpret the ambiguous portions of section 110(a)(1) and section 110(a)(2) in the context of acting on a particular SIP submission. In other words, EPA assumes that Congress could not have intended that each and every SIP submission, regardless of the NAAQS in question or the history of SIP development for the relevant pollutant, would meet each of the requirements, or meet each of them in the same way.

¹⁰ For example, implementation of the 1997 PM_{2.5} NAAQS required the deployment of a system of new monitors to measure ambient levels of that new indicator species for the new NAAQS.

Therefore, EPA has adopted an approach under which it reviews infrastructure SIP submissions against the list of elements in section 110(a)(2), but only to the extent each element applies for that particular NAAQS.

Historically, EPA has elected to use guidance documents to make recommendations to states for infrastructure SIPs, in some cases conveying needed interpretations on newly arising issues and in some cases conveying interpretations that have already been developed and applied to individual SIP submissions for particular elements.¹¹ EPA most recently issued guidance for infrastructure SIPs on September 13, 2013 (2013 Guidance).¹² EPA developed this document to provide states with up-to-date guidance for infrastructure SIPs for any new or revised NAAQS. Within this guidance, EPA describes the duty of states to make infrastructure SIP submissions to meet basic structural SIP requirements within three years of promulgation of a new or revised NAAQS. EPA also made recommendations about many specific subsections of section 110(a)(2) that are relevant in the context of infrastructure SIP submissions.¹³ The guidance also discusses the substantively important issues that are germane to certain subsections of section 110(a)(2). Significantly, EPA interprets sections 110(a)(1) and 110(a)(2) such that infrastructure SIP submissions need to address certain issues and need not address others. Accordingly, EPA

¹¹ EPA notes, however, that nothing in the CAA requires EPA to provide guidance or to promulgate regulations for infrastructure SIP submissions. The CAA directly applies to states and requires the submission of infrastructure SIP submissions, regardless of whether or not EPA provides guidance or regulations pertaining to such submissions. EPA elects to issue such guidance in order to assist states, as appropriate.

¹² “Guidance on Infrastructure State Implementation Plan (SIP) Elements under Clean Air Act sections 110(a)(1) and 110(a)(2),” Memorandum from Stephen D. Page, September 13, 2013.

¹³ EPA’s September 13, 2013, guidance did not make recommendations with respect to infrastructure SIP submissions to address section 110(a)(2)(D)(i)(I). EPA issued the guidance shortly after the U.S. Supreme Court agreed to review the D.C. Circuit decision in *EME Homer City*, 696 F.3d7 (D.C. Cir. 2012) which had interpreted the requirements of section 110(a)(2)(D)(i)(I). In light of the uncertainty created by ongoing litigation, EPA elected not to provide additional guidance on the requirements of section 110(a)(2)(D)(i)(I) at that time. As the guidance is neither binding nor required by statute, whether EPA elects to provide guidance on a particular section has no impact on a state’s CAA obligations.

reviews each infrastructure SIP submission for compliance with the applicable statutory provisions of section 110(a)(2), as appropriate.

As an example, section 110(a)(2)(E)(ii) is a required element of section 110(a)(2) for infrastructure SIP submissions. Under this element, a state must meet the substantive requirements of section 128, which pertain to state boards that approve permits or enforcement orders and heads of executive agencies with similar powers. Thus, EPA reviews infrastructure SIP submissions to ensure that the state's implementation plan appropriately addresses the requirements of section 110(a)(2)(E)(ii) and section 128. The 2013 Guidance explains EPA's interpretation that there may be a variety of ways by which states can appropriately address these substantive statutory requirements, depending on the structure of an individual state's permitting or enforcement program (*e.g.*, whether permits and enforcement orders are approved by a multi-member board or by a head of an executive agency). However they are addressed by the state, the substantive requirements of section 128 are necessarily included in EPA's evaluation of infrastructure SIP submissions because section 110(a)(2)(E)(ii) explicitly requires that the state satisfy the provisions of section 128.

As another example, EPA's review of infrastructure SIP submissions with respect to the PSD program requirements in sections 110(a)(2)(C), (D)(i)(II), and (J) focuses upon the structural PSD program requirements contained in part C and EPA's PSD regulations. Structural PSD program requirements include provisions necessary for the PSD program to address all regulated sources and new source review (NSR) pollutants, including greenhouse gases (GHGs). By contrast, structural PSD program requirements do not include provisions that are not required under EPA's regulations at 40 CFR 51.166 but are merely available as an option for the state, such as the option to provide grandfathering of complete permit applications with respect to the

2012 fine particulate matter (PM_{2.5}) NAAQS. Accordingly, the latter optional provisions are types of provisions EPA considers irrelevant in the context of an infrastructure SIP action.

For other section 110(a)(2) elements, however, EPA's review of a state's infrastructure SIP submission focuses on assuring that the state's SIP meets basic structural requirements. For example, section 110(a)(2)(C) includes, among other things, the requirement that states have a program to regulate minor new sources. Thus, EPA evaluates whether the state has an EPA-approved minor NSR program and whether the program addresses the pollutants relevant to that NAAQS. In the context of acting on an infrastructure SIP submission, however, EPA does not think it is necessary to conduct a review of each and every provision of a state's existing minor source program (*i.e.*, already in the existing SIP) for compliance with the requirements of the CAA and EPA's regulations that pertain to such programs.

With respect to certain other issues, EPA does not believe that an action on a state's infrastructure SIP submission is necessarily the appropriate type of action in which to address possible deficiencies in a state's existing SIP. These issues include: (i) existing provisions related to excess emissions from sources during periods of startup, shutdown, or malfunction that may be contrary to the CAA and EPA's policies addressing such excess emissions ("SSM"); (ii) existing provisions related to "director's variance" or "director's discretion" that may be contrary to the CAA because they purport to allow revisions to SIP-approved emissions limits while limiting public process or not requiring further approval by EPA; and (iii) existing provisions for PSD programs that may be inconsistent with current requirements of EPA's "Final NSR Improvement Rule," 67 FR 80186 (December 31, 2002), as amended by 72 FR 32526 (June 13, 2007) ("NSR Reform"). Thus, EPA believes it may approve an infrastructure SIP submission without scrutinizing the totality of the existing SIP for such potentially deficient provisions and

may approve the submission even if it is aware of such existing provisions.¹⁴ It is important to note that EPA's approval of a state's infrastructure SIP submission should not be construed as explicit or implicit re-approval of any existing potentially deficient provisions that relate to the three specific issues just described.

EPA's approach to review of infrastructure SIP submissions is to identify the CAA requirements that are logically applicable to that submission. EPA believes that this approach to the review of a particular infrastructure SIP submission is appropriate, because it would not be reasonable to read the general requirements of section 110(a)(1) and the list of elements in 110(a)(2) as requiring review of each and every provision of a state's existing SIP against all requirements in the CAA and EPA regulations merely for purposes of assuring that the state in question has the basic structural elements for a functioning SIP for a new or revised NAAQS. Because SIPs have grown by accretion over the decades as statutory and regulatory requirements under the CAA have evolved, they may include some outmoded provisions and historical artifacts. These provisions, while not fully up to date, nevertheless may not pose a significant problem for the purposes of "implementation, maintenance, and enforcement" of a new or revised NAAQS when EPA evaluates adequacy of the infrastructure SIP submission. EPA believes that a better approach is for states and EPA to focus attention on those elements of section 110(a)(2) of the CAA most likely to warrant a specific SIP revision due to the promulgation of a new or revised NAAQS or other factors.

For example, EPA's 2013 Guidance gives simpler recommendations with respect to carbon monoxide than other NAAQS pollutants to meet the visibility requirements of section

¹⁴ By contrast, EPA notes that if a state were to include a new provision in an infrastructure SIP submission that contained a legal deficiency, such as a new exemption for excess emissions during SSM events, then EPA would need to evaluate that provision for compliance against the rubric of applicable CAA requirements in the context of the action on the infrastructure SIP.

110(a)(2)(D)(i)(II), because carbon monoxide does not affect visibility. As a result, an infrastructure SIP submission for any future new or revised NAAQS for carbon monoxide need only state this fact in order to address the visibility prong of section 110(a)(2)(D)(i)(II).

Finally, EPA believes that its approach with respect to infrastructure SIP requirements is based on a reasonable reading of sections 110(a)(1) and 110(a)(2) because the CAA provides other avenues and mechanisms to address specific substantive deficiencies in existing SIPs. These other statutory tools allow EPA to take appropriately tailored action, depending upon the nature and severity of the alleged SIP deficiency. Section 110(k)(5) authorizes EPA to issue a “SIP call” whenever the Agency determines that a state’s SIP is substantially inadequate to attain or maintain the NAAQS, to mitigate interstate transport, or to otherwise comply with the CAA.¹⁵ Section 110(k)(6) authorizes EPA to correct errors in past actions, such as past approvals of SIP submissions.¹⁶ Significantly, EPA’s determination that an action on a state’s infrastructure SIP submission is not the appropriate time and place to address all potential existing SIP deficiencies does not preclude EPA’s subsequent reliance on provisions in section 110(a)(2) as part of the basis for action to correct those deficiencies at a later time. For example, although it may not be appropriate to require a state to eliminate all existing inappropriate director’s discretion provisions in the course of acting on an infrastructure SIP submission, EPA believes that section

¹⁵ For example, EPA issued a SIP call to Utah to address specific existing SIP deficiencies related to the treatment of excess emissions during SSM events. See “Finding of Substantial Inadequacy of Implementation Plan; Call for Utah State Implementation Plan Revisions,” 74 FR 21639 (April 18, 2011).

¹⁶ EPA has used this authority to correct errors in past actions on SIP submissions related to PSD programs. See “Limitation of Approval of Prevention of Significant Deterioration Provisions Concerning Greenhouse Gas Emitting-Sources in State Implementation Plans; Final Rule,” 75 FR 82536 (December 30, 2010). EPA has previously used its authority under CAA section 110(k)(6) to remove numerous other SIP provisions that the Agency determined it had approved in error. See, e.g., 61 FR 38664 (July 25, 1996) and 62 FR 34641 (June 27, 1997) (corrections to American Samoa, Arizona, California, Hawaii, and Nevada SIPs); 69 FR 67062 (November 16, 2004) (corrections to California SIP); and 74 FR 57051 (November 3, 2009) (corrections to Arizona and Nevada SIPs).

110(a)(2)(A) may be among the statutory bases that EPA relies upon in the course of addressing such deficiency in a subsequent action.¹⁷

IV. What is EPA’s Analysis of How Kentucky Addressed the Elements of the Sections 110(a)(1) and (2) “Infrastructure” Provisions?

Kentucky’s April 26, 2013, infrastructure submission addresses the provisions of sections 110(a)(1) and (2) as described below.

1. 110(a)(2)(A) *Emission Limits and Other Control Measures*: Section 110(a)(2)(A) requires that each implementation plan include enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements. These requirements are met through Kentucky Revised Statute (KRS) Chapter 224 Section 10-100 (KRS 224.10-100), which provides the KDAQ the authority to administer all rules, regulations, and orders promulgated under Chapter 224, and to provide for the prevention, abatement, and control of all water, land, and air pollution.

KDAQ cited to chapters and associated Kentucky Administrative Regulations (KAR) under Title 401 to demonstrate that the Commonwealth meets the requirements of this element, including the following:

¹⁷ See, e.g., EPA’s disapproval of a SIP submission from Colorado on the grounds that it would have included a director’s discretion provision inconsistent with CAA requirements, including section 110(a)(2)(A). See, e.g., 75 FR 42342 at 42344 (July 21, 2010) (proposed disapproval of director’s discretion provisions); 76 FR 4540 (Jan. 26, 2011) (final disapproval of such provisions).

- **Chapter 50 General Administrative Procedures:** 401 KAR 50:010. *Definitions for 401 KAR Chapter 50*; 401 KAR 50:012. *General application*; 401 KAR 50:015. *Documents incorporated by reference*; 401 KAR 50:020. *Air quality control regions*; 401 KAR 50:025. *Classification of counties*; 401 KAR 50:040. *Air quality models*; 401 KAR 50:042. *Good engineering practice stack height*; 401 KAR 50:045. *Performance tests*; 401 KAR 50:047. *Test procedures for capture efficiency*; 401 KAR 50:050. *Monitoring*; 401 KAR 50:055. *General compliance requirements*; and 401 KAR 50:060. *Enforcement.*
- **Chapter 51 Attainment and Maintenance of the National Ambient Air Quality Standards:** 401 KAR 51:001. *Definitions for 401 KAR Chapter 51*; 401 KAR 51:005. *Purpose and General Provisions*; 401 KAR 51:010. *Attainment Status Designations*; 401 KAR 51:017. *Prevention of significant deterioration of air quality*; 401 KAR 51:052. *Review of new sources in or impacting upon nonattainment areas.*
- **Chapter 52 Permits, Registrations, and Prohibitory Rules:** 401 KAR 52:001. *Definitions for 401 KAR Chapter 52*; 401 KAR 52:020. *Title V permits*¹⁸; 401 KAR 52:030. *Federally-enforceable permits for nonmajor sources*; 401 KAR 52:090. *Prohibitory rule for hot mix asphalt plants*; 401 KAR 53:005. *General provisions*; 401 KAR 53:010. *Ambient air quality standards.*

Collectively these regulations establish enforceable emissions limitations and other control measures, means or techniques, for activities that contribute to SO₂ concentrations in the

¹⁸ This rule is not approved into Kentucky's federally-approved SIP.

ambient air and provide authority for KDAQ to establish such limits and measures as well as schedules for compliance to meet the applicable requirements of the CAA. EPA has made the preliminary determination that the provisions contained in these regulations, and Kentucky's statute are adequate for enforceable emission limitations and other control measures, means, or techniques, as well as schedules and timetables for compliance for the 2010 1-hour SO₂ NAAQS in the Commonwealth.

In this action, EPA is not proposing to approve or disapprove any existing Commonwealth provisions with regard to excess emissions during SSM operations at a facility. EPA believes that a number of states have SSM provisions which are contrary to the CAA and existing EPA guidance, "State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown" (September 20, 1999), and the Agency is addressing such state regulations in a separate action.¹⁹

Additionally, in this action, EPA is not proposing to approve or disapprove any existing state rules with regard to director's discretion or variance provisions. EPA believes that a number of states have such provisions which are contrary to the CAA and existing EPA guidance (52 FR 45109 (November 24, 1987)), and the Agency plans to take action in the future to address such state regulations. In the meantime, EPA encourages any state having a director's discretion or variance provision which is contrary to the CAA and EPA guidance to take steps to correct the deficiency as soon as possible.

¹⁹ On June 12, 2015, EPA published a final action entitled, "State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA's SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction." See 80 FR 33840.

2. 110(a)(2)(B) Ambient Air Quality Monitoring/Data System: Section 110(a)(2)(B) requires SIPs to provide for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and analyze data on ambient air quality, and (ii) upon request, make such data available to the Administrator. These requirements are met through KRS 224.10-100 (22), which provides KDAQ the authority to require the installation, maintenance, and use of equipment, devices, or tests and methodologies to monitor the nature and amount of any substance emitted into the ambient air and to provide the information to the cabinet.

KDAQ cites the following regulations to demonstrate that the Commonwealth meets the requirements of this element: 401 KAR 50:050. *Monitoring*; 401 KAR 51:017. *Prevention of significant deterioration of air quality*; and 401 KAR 51:052. *Review of new sources in or impacting upon nonattainment areas*; 401 KAR 53:005. *General provisions*; 401 KAR 53:010. *Ambient air quality standards*.

These SIP-approved rules and Kentucky's statute, along with Kentucky's Ambient Air Monitoring Network Plan, provide for the establishment and operation of ambient air quality monitors, the compilation and analysis of ambient air quality data, and the submission of these data to EPA upon request. Annually, states develop and submit to EPA for approval statewide ambient monitoring network plans consistent with the requirements of 40 CFR parts 50, 53, and 58. The annual network plan involves an evaluation of any proposed changes to the monitoring network, includes the annual ambient monitoring network design plan and a certified evaluation of the agency's ambient monitors and auxiliary support equipment.²⁰ KDAQ's monitoring

²⁰ On occasion, proposed changes to the monitoring network are evaluated outside of the network plan approval process in accordance with 40 CFR part 58.

network plan was submitted on July 1, 2015, and approved by EPA on October 28, 2015.

Kentucky's approved monitoring network plan can be accessed at www.regulations.gov using Docket ID No. EPA-R04-OAR-2014-0426. EPA has made the preliminary determination that Kentucky's SIP and practices are adequate for the ambient air quality monitoring and data system related to the 2010 1-hour SO₂ NAAQS.

3. 110(a)(2)(C) *Programs for Enforcement of Control Measures and for Construction or*

Modification of Stationary Sources: This element consists of three sub-elements: enforcement, state-wide regulation of new and modified minor sources and minor modifications of major sources, and preconstruction permitting of major sources and major modifications in areas designated attainment or unclassifiable for the subject NAAQS as required by CAA title I part C (i.e., the major source PSD program). These requirements are met through 401 KAR 50:060. *Enforcement*; 401 KAR 51:017. *Prevention of significant deterioration of air quality*; and 401 KAR 51:052. *Review of new sources in or impacting upon nonattainment areas*. Collectively, these regulations enable KDAQ to regulate sources contributing to the 2010 1-hour SO₂ NAAQS. EPA's analysis of how these provisions of Kentucky's SIP address each sub-element (with the exception of the minor source program requirements, as set forth below) is described below.

Enforcement: KDAQ's SIP-approved regulation, 401 KAR 50:060. *Enforcement*, provides for enforcement of SO₂ emission limits and control measures through permit and compliance schedule modifications and revocations, and authorizes administrative penalties and injunctive relief, citing to statutory civil penalty and injunctive relief provisions of KRS 224.99-010. EPA

has made the preliminary determination that Kentucky's SIP is adequate for enforcement related to the 2010 1-hour SO₂ NAAQS.

PSD Permitting for Major Sources: EPA interprets the PSD sub-element to require that a state's infrastructure SIP submission for a particular NAAQS demonstrate that the state has a complete PSD permitting program in place covering the structural PSD requirements for all regulated NSR pollutants. A state's PSD permitting program is complete for this sub-element (and prong 3 of D(i) and J related to PSD) if EPA has already approved or is simultaneously approving the state's SIP with respect to all structural PSD requirements that are due under the EPA regulations or the CAA on or before the date of the EPA's proposed action on the infrastructure SIP submission. For the 2010 1-hour SO₂ NAAQS, Kentucky's authority to regulate new and modified sources to assist in the protection of air quality in attainment or unclassifiable areas is established in KAR Chapter 51 – *Attainment and Maintenance of the National Ambient Air Quality Standards*, which describes the permit requirements for new major sources or major modifications of existing sources in areas classified as attainment or unclassifiable under section 107(d)(1)(A)(ii) or (iii) of the CAA. These requirements are designed to ensure that sources in areas attaining the NAAQS at the time of designations prevent any significant deterioration in air quality. Chapter 51 also establishes the permitting requirements for areas in or around nonattainment areas and provides the Commonwealth's statutory authority to enforce regulations relating to attainment and maintenance of the NAAQS.

Kentucky's infrastructure SIP submission demonstrates that new major sources and major modifications in areas of the Commonwealth designated attainment or unclassifiable for the specified NAAQS are subject to a federally-approved PSD permitting program meeting all the current structural requirements of part C of title I of the CAA to satisfy the infrastructure SIP

PSD elements.²¹ EPA has made the preliminary determination that Kentucky's SIP is adequate for PSD permitting for major sources related to the 2010 1-hour SO₂ NAAQS.

Regulation of minor sources and minor modifications: Section 110(a)(2)(C) also requires the SIP to include provisions that govern the minor source preconstruction program that regulates emissions of the 2010 1-hour SO₂ NAAQS. EPA is not proposing any action in this rulemaking related to the regulation of minor sources and minor modifications under section 110(a)(2)(C) and will consider these requirements in relation to Kentucky's 2010 1-hour SO₂ NAAQS infrastructure submission in a separate rulemaking.

4. 110(a)(2)(D)(i)(I) and (II) *Interstate Pollution Transport*: Section 110(a)(2)(D)(i) has two components: 110(a)(2)(D)(i)(I) and 110(a)(2)(D)(i)(II). Each of these components has two subparts resulting in four distinct components, commonly referred to as “prongs,” that must be addressed in infrastructure SIP submissions. The first two prongs, which are codified in section 110(a)(2)(D)(i)(I), are provisions that prohibit any source or other type of emissions activity in one state from contributing significantly to nonattainment of the NAAQS in another state (“prong 1”), and interfering with maintenance of the NAAQS in another state (“prong 2”). The third and fourth prongs, which are codified in section 110(a)(2)(D)(i)(II), are provisions that prohibit emissions activity in one state from interfering with measures required to prevent significant deterioration of air quality in another state (“prong 3”), or to protect visibility in another state (“prong 4”).

110(a)(2)(D)(i)(I) – prongs 1 and 2: EPA is not proposing any action in this rulemaking related to the interstate transport provisions pertaining to the contribution to nonattainment or

²¹ For more information concerning how the Kentucky infrastructure SIP submission currently meets applicable structural PSD program requirements, see the technical support document in the docket for today's rulemaking.

interference with maintenance in other states of section 110(a)(2)(D)(i)(I) (prongs 1 and 2) because Kentucky's 2010 1-hour SO₂ NAAQS infrastructure submission did not address prongs 1 and 2.

110(a)(2)(D)(i)(II) – prong 3: With regard to section 110(a)(2)(D)(i)(II), the PSD element, referred to as prong 3, this requirement may be met by a state's confirmation in an infrastructure SIP submission that new major sources and major modifications in the state are subject to: a PSD program meeting all the current structural requirements of part C of title I of the CAA, or (if the state contains a nonattainment area that has the potential to impact PSD in another state) to a NNSR program. As discussed in more detail above under section 110(a)(2)(C), Kentucky's SIP contains the relevant SIP revisions necessary to satisfy the structural PSD requirements of prong 3. Kentucky's SIP-approved NNSR program is found at 401 KAR 51:052. *Review of new sources in or impacting upon nonattainment areas.* EPA has made the preliminary determination that Kentucky's SIP is adequate for interstate transport for permitting of major sources and major modifications related to the 2010 1-hour SO₂ NAAQS for section 110(a)(2)(D)(i)(II) (prong 3).

110(a)(2)(D)(i)(II) – prong 4: EPA is not proposing any action in this rulemaking related to the interstate transport provisions pertaining to visibility protection in other states of section 110(a)(2)(D)(i)(II) (prong 4) and will consider these requirements in relation to Kentucky's 2010 1-hour SO₂ NAAQS infrastructure submission in a separate rulemaking.

5. 110(a)(2)(D)(ii) *Interstate and International Transport Provisions:* Section 110(a)(2)(D)(ii) requires SIPs to include provisions ensuring compliance with sections 115 and 126 of the Act, relating to interstate and international pollution abatement. Regulation 401 KAR 51:010.

Attainment Status Designations designates the status of all areas of the Commonwealth of Kentucky with regard to attainment of the NAAQS. Regulation 401 KAR 51:017. *Prevention of significant deterioration of air quality* and Regulation 401 KAR 51:052. *Review of new sources in or impacting upon nonattainment areas*, Section 1, require Kentucky to provide notice to nearby states that may be affected by proposed major source modifications. These regulations cite to Federal notification requirements under 40 CFR Sections 51.166 and 52.21, and to 401 KAR 52:100. *Public, affected state, and US. EPA review*, Section 6, which requires that public notice for permit actions be provided to affected states. Additionally, Kentucky does not have any pending obligation under sections 115 and 126 of the CAA. EPA has made the preliminary determination that Kentucky's SIP is adequate for ensuring compliance with the applicable requirements relating to interstate and international pollution abatement for the 2010 1-hour SO₂ NAAQS.

6. 110(a)(2)(E) Adequate Resources and Authority, Conflict of Interest, and Oversight of Local Governments and Regional Agencies: Section 110(a)(2)(E) requires that each implementation plan provide (i) necessary assurances that the state will have adequate personnel, funding, and authority under state law to carry out its implementation plan, (ii) that the state comply with the requirements respecting state boards pursuant to section 128 of the Act, and (iii) necessary assurances that, where the state has relied on a local or regional government, agency, or instrumentality for the implementation of any plan provision, the state has responsibility for ensuring adequate implementation of such plan provisions. EPA is proposing to approve Kentucky's SIP submission as meeting the requirements of sub-elements 110(a)(2)(E)(i), (ii), and (iii).

In support of EPA's proposal to approve elements 110(a)(2)(E)(i) and (iii), KDAQ's infrastructure submission demonstrates that it is responsible for promulgating rules and regulations for the NAAQS, emissions standards, general policies, a system of permits, fee schedules for the review of plans, and other planning needs. With respect to having the necessary funding and authority to implement the Kentucky SIP, Kentucky regulation, 401 KAR 50:038. *Air Emissions Fee*, and the following State statutes support sub-elements (i) and (iii): KRS 224.10-100. *Powers and Duties of the Cabinet* and KRS 224.10-020. *Departments within the cabinet - Offices and divisions within the departments – Appointments*. As evidence of the adequacy of KDAQ's resources with respect to sub-elements (i) and (iii), EPA submitted a letter to KDAQ on March 12, 2015, outlining 105 grant commitments and current status of these commitments for fiscal year 2014. The letter EPA submitted to KDAQ can be accessed at www.regulations.gov using Docket ID No. EPA-R04-OAR-2014-0426. Annually, states update these grant commitments based on current SIP requirements, air quality planning, and applicable requirements related to the NAAQS. There were no outstanding issues in relation to the SIP for fiscal year 2014, therefore, KDAQ's grants were finalized and closed out. In addition, the requirements of 110(a)(2)(E)(i) and (iii) are met when EPA performs a completeness determination for each SIP submittal. This determination ensures that each submittal provides evidence that adequate personnel, funding, and legal authority under state law has been used to carry out the state's implementation plan and related issues. KDAQ's authority is included in all prehearings and final SIP submittal packages for approval by EPA. EPA has made the preliminary determination that Kentucky has adequate resources for implementation of the 2010 1-hour SO₂ NAAQS. Accordingly, EPA is proposing to approve Kentucky's infrastructure SIP submission with respect to section 110(a)(2)(E)(i) and (iii).

Section 110(a)(2)(E)(ii) requires that Kentucky comply with section 128 of the CAA. Section 128 requires at 128(a)(1) the majority of members of the state board or body which approves permits or enforcement orders represent the public interest and do not derive any significant portion of their income from persons subject to permitting or enforcement orders under the CAA; and 128(a)(2) any potential conflicts of interest by such board or body, or the head of an executive agency with similar, powers be adequately disclosed. For purposes of section 128(a)(1), Kentucky has no boards or bodies with authority over air pollution permits or enforcement actions. Such matters are instead handled by the Director of the KDAQ. As such, a “board or body” is not responsible for approving permits or enforcement orders in Kentucky, and the requirements of section 128(a)(1) are not applicable. For purposes of section 128(a)(2), KDAQ’s SIP has been updated. On October 3, 2012, EPA took final action to approve incorporation of KRS Chapters 11A.020, 11A.030, 11A.040 and Chapters 224.10-020 and 224.10-100 into the SIP to address the conflict of interest requirements of section 128. *See 77 FR 60307.* These SIP-approved state statutes establish the powers and duties of the cabinet, departments within the cabinet, and offices and divisions within such departments (Chapters 224.10-020 and 224.10-100), and support sub-element (ii) by requiring adequate disclosures of potential conflicts (KRS 11A.020. *Public servant prohibited from certain conduct – Exception - Disclosure of personal or private interest*) and otherwise ensuring that public officers and servants do not engage in activities that may present a conflict of interest (KRS 11A.030 *Considerations in determination to abstain from action on official decision - Advisory opinion*; and KRS 11A.040 *Acts prohibited for public servant or officer – Exception*). With the incorporation of these regulations and statutes into the Kentucky SIP, EPA has made the preliminary determination that the Commonwealth has adequately addressed the requirements of

section 128(a)(2), and accordingly has met the requirements of section 110(a)(2)(E)(ii) with respect to infrastructure SIP requirements. Thus, EPA is proposing approval of KDAQ's infrastructure SIP submission for the 2010 1-hour SO₂ NAAQS with respect to section 110(a)(2)(E)(ii).

7. 110(a)(2)(F) Stationary Source Monitoring and Reporting: Section 110(a)(2)(F) requires SIPs to meet applicable requirements addressing (i) the installation, maintenance, and replacement of equipment, and the implementation of other necessary steps, by owners or operators of stationary sources to monitor emissions from such sources, (ii) periodic reports on the nature and amounts of emissions and emissions related data from such sources, and (iii) correlation of such reports by the state agency with any emission limitations or standards established pursuant to this section, which reports shall be available at reasonable times for public inspection. The Kentucky infrastructure submission describes how the major source and minor source emission inventory programs collect emission data throughout the Commonwealth and ensure the quality of such data. Kentucky meets these requirements through Chapter 50 *General Administrative Procedures*, specifically 401 KAR 50:050 *Monitoring*. 401 KAR 50:050, Section 1, *Monitoring Records and Reporting*, states that the cabinet may require a facility to install, use, and maintain stack gas and ambient air monitoring equipment and to establish and maintain records, and make periodic emission reports at intervals prescribed by the cabinet. 401 KAR 50:050 *Monitoring*, Section 1, *Monitoring, Records, and Reporting*, establishes the requirements for the installation, use, and maintenance of stack gas and ambient air monitoring equipment, and authorizes the cabinet to require the owner or operator of any affected facility to establish and maintain records for this equipment and make periodic emission reports at intervals prescribed by the cabinet. Also, KRS 224.10-100 (23) requires that any

person engaged in any operation regulated pursuant to this chapter file with the cabinet reports containing information as to location, size, height, rate of emission or discharge, and composition of any substance discharged or emitted into the ambient air or into the waters or onto the land of the Commonwealth, and such other information the cabinet may require. In addition, EPA is unaware of any provision preventing the use of credible evidence in the Kentucky SIP.²²

Additionally, Kentucky is required to submit emissions data to EPA for purposes of the National Emissions Inventory (NEI). The NEI is EPA's central repository for air emissions data. EPA published the Air Emissions Reporting Rule (AERR) on December 5, 2008, which modified the requirements for collecting and reporting air emissions data (73 FR 76539). The AERR shortened the time states had to report emissions data from 17 to 12 months, giving states one calendar year to submit emissions data. All states are required to submit a comprehensive emissions inventory every three years and report emissions for certain larger sources annually through EPA's online Emissions Inventory System. States report emissions data for the six criteria pollutants and the precursors that form them – nitrogen oxides, SO₂, ammonia, lead, carbon monoxide, particulate matter, and volatile organic compounds. Many states also voluntarily report emissions of hazardous air pollutants. Kentucky made its latest update to the NEI on November 6, 2014. EPA compiles the emissions data, supplementing it where necessary, and releases it to the general public through the website <http://www.epa.gov/ttn/chief/eiinformation.html>. EPA has made the preliminary determination that Kentucky's SIP and practices are adequate for the stationary source monitoring systems

²² “*Credible Evidence*,” makes allowances for owners and/or operators to utilize “any credible evidence or information relevant” to demonstrate compliance with applicable requirements if the appropriate performance or compliance test had been performed, for the purpose of submitting compliance certification and can be used to establish whether or not an owner or operator has violated or is in violation of any rule or standard.

related to the 2010 1-hour SO₂ NAAQS. Accordingly, EPA is proposing to approve Kentucky's infrastructure SIP submission with respect to section 110(a)(2)(F).

8. 110(a)(2)(G) *Emergency Powers*: This section requires that states demonstrate authority comparable with section 303 of the CAA and adequate contingency plans to implement such authority. Kentucky's infrastructure SIP submission identifies air pollution emergency episodes and preplanned abatement strategies as outlined in the following Kentucky regulations in Chapter 55 *Emergency Episodes*, specifically: 401 KAR 55:005. *Significant harm criteria*, 401 KAR 55:010. *Episode Criteria*, and 401 KAR 55:015. *Episode Declaration*. 401 KAR 55:005. *Significant Harm Criteria*, Section 1, *Purpose*, defines those levels of pollutant concentration which must be prevented in order to avoid significant harm to the health of persons. 401 KAR 55:010. *Episodic Criteria*, defines those levels of pollutant concentrations which justify the proclamation of an air pollution alert, air pollution warning, an air pollution emergency. 401 KAR 55:015. *Episode Declaration*, provides for the curtailment or reduction of processes or operations which emit an air contaminant or an air contaminant precursor whose criteria has been reached and are located in the affected areas for which an episode level has been declared.

In addition, KRS 224.10-100 *Powers and duties of cabinet* and KRS 224.10-410 *Order for discontinuance, abatement, or alleviation of condition or activity without hearing -- Subsequent hearing*, establish the authority for Kentucky's secretary to issue orders to person(s) for discontinuance, abatement, or alleviation of any condition or activity without hearing because the condition or activity presents a danger to the health or welfare of the people of the state, and for the cabinet to require adoption of any remedial measures deemed necessary. EPA has made the preliminary determination that Kentucky's SIP, and state laws are adequate for emergency

powers related to the 2010 1-hour SO₂ NAAQS. Accordingly, EPA is proposing to approve Kentucky's infrastructure SIP submission with respect to section 110(a)(2)(G).

9. 110(a)(2)(H) SIP Revisions: Section 110(a)(2)(H), in summary, requires each SIP to provide for revisions of such plan (i) as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of attaining such standard, and (ii) whenever the Administrator finds that the plan is substantially inadequate to attain the NAAQS or to otherwise comply with any additional applicable requirements. As previously discussed, KDAQ is responsible for adopting air quality rules and revising SIPs as needed to attain or maintain the NAAQS. Kentucky has the ability and authority to respond to calls for SIP revisions, and has provided a number of SIP revisions over the years for implementation of the NAAQS.

KDAQ is responsible for adopting air quality rules and revising SIPs as needed to attain or maintain the NAAQS in Kentucky. 401 KAR Chapter 53 *Ambient Air Quality* and Chapter 51 *Attainment and Maintenance of the National Ambient Air Quality Standards* grant KDAQ the broad authority to implement the CAA, and as such, provides KDAQ the authority to prepare and develop, after proper study, a comprehensive plan for the prevention of air pollution. These statutes also provide KDAQ the ability and authority to respond to calls for SIP revisions, and KDAQ has provided a number of SIP revisions over the years for implementation of the NAAQS. Additionally, 401 KAR 53:010 outlines the ambient air quality standards necessary for the protection of the public health, the general welfare, and the property and people in the Commonwealth and states that within 60 days of promulgation or revision of any NAAQS by EPA, the cabinet will initiate a process to promulgate or review this administrative regulation. 401 KAR 51:010. *Attainment Status Designations* provides provisions for the Cabinet to review

applicable data and submit to EPA proposed revisions to the list of attainment-nonattainment areas. EPA has made the preliminary determination that Kentucky adequately demonstrates a commitment to provide future SIP revisions related to the 2010 1-hour SO₂ NAAQS when necessary. Accordingly, EPA is proposing to approve Kentucky's infrastructure SIP submission for the 2010 1-hour SO₂ NAAQS with respect to section 110(a)(2)(H).

10. 110(a)(2)(J) Consultation with Government Officials, Public Notification, and PSD and Visibility Protection: EPA is proposing to approve Kentucky's infrastructure SIP submission for the 2010 1-hour SO₂ NAAQS with respect to the general requirement in section 110(a)(2)(J) to include a program in the SIP that provides for meeting the applicable consultation requirements of section 121, the public notification requirements of section 127, PSD, and visibility. EPA's rationale for each sub-element is described below.

Consultation with government officials (121 consultation): Section 110(a)(2)(J) of the CAA requires states to provide a process for consultation with local governments, designated organizations and Federal Land Managers carrying out NAAQS implementation requirements pursuant to section 121 relative to consultation. This requirement is met through provisions in separate implementation plans, such as the Regional Haze SIP, which provide for continued consultation with government officials, including the Federal Land Managers (FLMs). Kentucky adopted consultation procedures in coordination with the transportation partners in the Commonwealth, for the implementation of transportation conformity, which includes the development of mobile inventories for SIP development. Required partners covered by Kentucky's consultation procedures include Federal, state and local transportation and air quality agency officials. Implementation of transportation conformity as outlined in the consultation procedures requires KDAQ to consult with Federal, state and local transportation and air quality

agency officials on the development of motor vehicle emissions budgets. Also, KDAQ notes in its April 26, 2013, SIP submission that the following Kentucky regulations provide the Commonwealth the authority to meet this requirement: 401 KAR 50:055. *General compliance requirements*; 401 KAR 50:060. *Enforcement*; 401 KAR 50:065. *Conformity of general federal actions*; 401 KAR 50:066. *Conformity of Transportation Plans, Programs, and Projects*; 401 KAR 51:017. *Prevention of Significant Deterioration of Air Quality*; and 401 KAR 51:052. *Review of new sources in or impacting upon nonattainment areas*. EPA has made the preliminary determination that Kentucky's SIP and practices adequately demonstrate consultation with government officials related to the 2010 1-hour SO₂ NAAQS when necessary for the consultation with government officials element of section 110(a)(2)(J).

Public notification (127 public notification): These requirements are met through the following Kentucky regulations: 401 KAR 51:001. *Definitions for 401 KAR Chapter 51*; 401 KAR 51:005. *Purpose and General Provisions*; 401 KAR 51:010. *Attainment Status Designations*; 401 KAR 51:017. *Prevention of significant deterioration of air quality*; 401 KAR 51:052. *Review of new sources in or impacting upon nonattainment areas*; and 401 KAR 52:100. *Public, Affected State, and US. EPA Review*. Additionally, Kentucky provides air quality information to the public via its website at: <http://eppcapp.ky.gov/daq/>. EPA has made the preliminary determination that Kentucky's SIP and practices adequately demonstrate the Commonwealth's ability to provide public notification related to the 2010 1-hour SO₂ NAAQS when necessary for the public notification element of section 110(a)(2)(J).

PSD: With regard to the PSD element of section 110(a)(2)(J), this requirement may be met by a state's confirmation in an infrastructure SIP submission that new major sources and major modifications in the state are subject to a PSD program meeting all the current structural

requirements of part C of title I of the CAA. As discussed in more detail above under section 110(a)(2)(C), Kentucky's SIP contains the relevant SIP revisions necessary to satisfy the structural PSD requirements of this element of section 110(a)(2)(J). EPA has made the preliminary determination that Kentucky's SIP is adequate for the PSD element of section 110(a)(2)(J).

Visibility protection: EPA's 2013 Guidance notes that it does not treat the visibility protection aspects of section 110(a)(2)(J) as applicable for purposes of the infrastructure SIP approval process. EPA recognizes that states are subject to visibility protection and regional haze program requirements under Part C of the Act (which includes sections 169A and 169B). However, there are no newly applicable visibility protection obligations after the promulgation of a new or revised NAAQS. Thus, EPA has determined that states do not need to address the visibility component of 110(a)(2)(J) in infrastructure SIP submittals. As such, EPA has made the determination that it does not need to address the visibility protection element of section 110(a)(2)(J) in Kentucky's infrastructure SIP submission related to the 2010 1-hour SO₂ NAAQS.

11. 110(a)(2)(K) *Air Quality Modeling and Submission of Modeling Data:* Section 110(a)(2)(K) of the CAA requires that SIPs provide for performing air quality modeling so that effects on air quality of emissions from NAAQS pollutants can be predicted and submission of such data to the EPA can be made. This requirement is met through Kentucky regulations 401 KAR 50:040. *Air Quality Models* and 401 KAR 50:050. *Monitoring*. Additionally, Kentucky participates in a regional effort to coordinate the development of emissions inventories and conduct regional modeling for several NAAQS, including the 2010 1-hour SO₂ NAAQS, for the

Southeastern states. Taken as a whole, Kentucky's air quality regulations and practices demonstrate that KDAQ has the authority to provide relevant data for the purpose of predicting the effect on ambient air quality of the 2010 1-hour SO₂ NAAQS. EPA has made the preliminary determination that Kentucky's SIP and practices adequately demonstrate the Commonwealth's ability to provide for air quality modeling, along with analysis of the associated data, related to the 2010 1-hour SO₂ NAAQS. Accordingly, EPA is proposing to approve Kentucky's infrastructure SIP submission with respect to section 110(a)(2)(K).

12. 110(a)(2)(L) *Permitting Fees*: This section requires the SIP to direct the owner or operator of each major stationary source to pay to the permitting authority, as a condition of any permit required under the CAA, a fee sufficient to cover (i) the reasonable costs of reviewing and acting upon any application for such a permit, and (ii) if the owner or operator receives a permit for such source, the reasonable costs of implementing and enforcing the terms and conditions of any such permit (not including any court costs or other costs associated with any enforcement action), until such fee requirement is superseded with respect to such sources by the Administrator's approval of a fee program under title V.

Kentucky regulation, 401 KAR 50:038 *Air Emissions Fee*,²³ provides for the assessment of fees necessary to fund the state permit program. KDAQ ensures this is sufficient for the reasonable cost of reviewing and acting upon PSD and NNSR permits. Additionally, Kentucky has a fully approved title V operating permit program at 401 KAR 52:020 *Title V permits*²⁴ that covers the cost of implementation and enforcement of PSD and NNSR permits after they have

²³ This rule is not approved into the federally approved SIP.

²⁴ This rule is not approved into the federally approved SIP.

been issued. EPA has made the preliminary determination that Kentucky's SIP and practices adequately provide for permitting fees related to the 2010 1-hour SO₂ NAAQS, when necessary. Accordingly, EPA is proposing to approve Kentucky's infrastructure SIP submission with respect to section 110(a)(2)(L).

13. 110(a)(2)(M) *Consultation and Participation by Affected Local Entities:* Section 110(a)(2)(M) of the Act requires states to provide for consultation and participation in SIP development by local political subdivisions affected by the SIP. This requirement is met through provisions in separate implementation plans, such as the regional haze SIP, which provide for continued consultation with government officials, including the FLMs. Kentucky regulation, 401 KAR 50:066. *Conformity of transportation plans, programs, and projects*, and the interagency consultation process as directed by Kentucky's approved Conformity SIP and 40 CFR 93.112 provide for consultation with local groups. More specifically, Kentucky adopted state-wide consultation procedures for the implementation of transportation conformity which includes the development of mobile inventories for SIP development and the requirements that link transportation planning and air quality planning in nonattainment and maintenance areas. Required partners covered by Kentucky's consultation procedures include Federal, state and local transportation and air quality agency officials. The state and local transportation agency officials are most directly impacted by transportation conformity requirements and are required to provide public involvement for their activities including the analysis demonstrating how they meet transportation conformity requirements. Further, Kentucky's SO₂ infrastructure SIP submission notes that the following State regulations and State statutes provide the Commonwealth the authority to meet the requirements of this element: 401 KAR 50:066.

Conformity of transportation plans, programs, and projects; 401 KAR 52:100. *Public, Affected State, and US EPA Review*; and KRS Chapter 77. *Air Pollution Control*. EPA has made the preliminary determination that Kentucky's SIP and practices adequately demonstrate consultation with affected local entities related to the 2010 1-hour SO₂ NAAQS when necessary.

V. Proposed Action

With the exception of interstate transport provisions pertaining to the contribution to nonattainment or interference with maintenance in other states and visibility protection requirements of section 110(a)(2)(D)(i)(I) and (II) (prongs 1, 2, and 4) and the minor source program requirements of section 110(a)(2)(C), EPA is proposing to approve Kentucky's April 26, 2013, infrastructure SIP submission for the 2010 1-hour SO₂ NAAQS for the above described infrastructure SIP requirements. EPA is proposing to approve these portions of Kentucky's infrastructure SIP submission for the 2010 1-hour SO₂ NAAQS because these aspects of the submission are consistent with section 110 of the CAA.

VI. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. *See* 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this proposed action merely approves state law as meeting federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this proposed action:

- is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it impose substantial direct costs on tribal governments or preempt tribal law.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: March 25, 2016.

Heather McTeer Toney

Regional Administrator,

Region 4.

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